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IN THE

Supreme Court of the United States

October Term, 1954 No. 163

CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as INDEPENDENT POSTER EXCHANGE,

Petitioners

vs.

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., 20TH CENTURY-FOX FILM CORP., UNITED ARTISTS CORP., WARNER BROS. PICTURES DISTRIBUTING CORP., PARAMOUNT FILM DISTRIBUTING CORP., UNIVERSAL FILM EXCHANGES, INC.,

Respondents

BRIEF FOR THE PETITIONERS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 153), is reported at 211 F. 2d 934. The opinion of the District Court (R. 76a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 30, 1954 (R. 158). The petition for certiorari was filed June 23, 1954 and granted October 14, 1954. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

I.

Whether a consent judgment of dismissal of an anti-trust action "with prejudice", but without any stipulation of facts, or adjudication by the court, will prevent the plaintiff from bringing a second action against the same parties, and based on continuance of the same conspiracy, but claiming relief only on the basis of restraints imposed and injuries suffered subsequent to the termination of the first action.

II.

If so, whether the plaintiff may maintain his action against persons who joined the conspiracy after the termination of the first action and who, therefore, were not parties to that action.

STATEMENT

Since December, 1940, petitioners have been engaged in the business of servicing motion picture exhibitors with the advertising signs and posters used in and around theatres (R. 43a). These posters are generally supplied on a rental basis, and the distributors are known as poster renters (R. 45a, 73a). Petitioners' operations are restricted to the Philadelphia area (R. 31a).

Respondent National Screen Service Corporation (hereinafter called National) also is a poster renter. It competes with petitioners in the Philadelphia area (R. 13a, 29a, 47a) but operates on a national scale (R. 11a, 56a).

The other respondents are the eight major American motion picture companies (R. 48a-49a). They control the production and initial disposition of the posters relating to their pictures (R. 10a-11a, 44a, 48a).

Prior to 1940, all poster renters could obtain supplies of posters by buying them directly from the film companies,

and supplies could sometimes be obtained by buying them from other poster renters, and from exhibitors who had bought them from the film companies (R. 30a, 44a-45a, 59a). The film companies themselves did not rent posters, but sold them, to all comers, at one price (R. 45a).

In January, 1940, two film companies—Paramount Film Distributing Corporation and RKO Radio Pictures, Inc.—entered into written agreements with National the effect of which was to enable National to obtain control of the entire output of the posters produced for the pictures of those companies[1] (R. 52a, 46a). Since a poster renter must offer supplies of posters of all major film companies, this arrangement appeared to sound the death knell for all renters other than National and, indeed, a large number promptly sold out to it (R. 46a, 72a-74a). Petitioners, however, and some others, found a way—"with difficulty and at a high price"—to buy a stopgap supply of Paramount and RKO posters from independent Canadian sources, and thus managed to remain in business (R. 47a), the other six film companies continuing, for the time being, to sell their posters to all renters, including National, on equal terms (R. 46a, 47a).

On February 6, 1942, however, a third film company —Loew's Incorporated—likewise gave National control of its posters (R. 17a-18a); whereupon, on April 8, 1942, petitioners, and other still-surviving independents, jointly commenced a treble damage and injunction action,[2] against National, Paramount, RKO and Loew's charging illegality of their exclusionary agreements under Sections 1 and 2 of the Sherman Antitrust Act (R. 18a). Before any trial or hearing was had in that action the parties settled it. Specifically, on April 21, 1943, the plaintiffs and National signed agreements whereby National agreed to permit each plaintiff to buy from it supplies of the posters controlled or to be

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[1] These agreements were on a share the profits basis (R. 42a).

[2] Civil Action 2472, Eastern District of Pennsylvania (R. 86-106).

controlled by it (R. 25a);[3] and, on April 26, 1943, all parties signed and filed a stipulation that "the action shall be dismissed with prejudice" (R. 84a). On the same day, and solely on the basis of the stipulation, the court signed an order reading: "The action is dismissed with prejudice" (R. 84a). Thereafter, all the other major film companies entered into similarly exclusionary agreements with National, viz.: Universal Film Exchanges, Inc., on August 1, 1944; Columbia Pictures Corp. on April 22, 1945; United Artists Corp. on January 26, 1946; Warner Bros. Distributing Corp. on March 22, 1946; Twentieth Century-Fox Film Corp. on July 1, 1947 (R. 18a, 51a-53a). This, of course, made it necessary for petitioners to obtain all their basic supplies from their competitor, National, or go out of business.

On August 18, 1949, petitioners commenced the instant action against National and all eight major film companies, again charging illegality of the exclusionary agreements and praying for treble damages and an injunction.[4] The damages claimed are for injuries sustained by petitioners as a result of restraints imposed since the termination of the 1942 action only. More fully, the law of Pennsylvania[5] establishes a six-year limitation period for tort actions of this kind, and therefore petitioners claim only for losses sustained from operation of the monopoly since August 16, 1943, or several months after termination of the 1942 action.

With respect to the settlement agreement of the 1942 action, the Amended Complaint in the instant action recited that (R. 18a):

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[3] This agreement had an original term of three years. It was renewed for an additional five year period on May 1, 1946, but since April 30, 1951 the supply of posters to petitioners and others in like position has been entirely dependent on the discretion of National. (R. 107)

[4] In this case petitioners complain of restrictions imposed on them by the settlement agreement as a condition of getting supplies, and of various unfair practices on the part of National, made possible by its monopoly position. (R. 11a-15a, 26a, 31a, 64a-65a, 67a)

[5] Act of March 27, 1913, 1 Sm. L. 721, 12 Purdon's Statutes §31.

"(a) Plaintiffs aver that they entered into said contract against their will and only because they believed that if they refused to enter into the agreement they would be forced to abandon their business altogether; and that the said contract was not a fair or equitable settlement of the litigation but, was intended by the defendants to be, and was in fact, a means of perpetuating and extending NATIONAL'S monopolization of the motion picture advertising business."

On October 20, 1950, petitioners moved for entry of summary judgment for injunctive relief, and, on July 27, 1951, McGranery, J., filed an opinion[6] holding that the motion should be granted with respect to National, but not with respect to the film companies (R. 60a-71a). Because of the difficulty of framing an injunction against only one defendant (R. 71a) no final decree was entered, but the correctness of Judge McGranery's conclusions on the merits has never been questioned by any other judge.

On November 6, 1953 the District Court, on motion, entered an order dismissing the action as to all respondents on the ground that the judgment of dismissal of the 1942 action bars this action absolutely under the law of res judicata (R. 76a-83a). On March 30, 1954, the judgment of the District Court was affirmed by the Court of Appeals for the Third Circuit (R. 153-158).

ARGUMENT

I.

The opinion below is in direct conflict with the decision of this Court in United States v. International Bldg. Co., 345 U. S. 502.

In that case, the facts were: In 1942 the United States

[6] Reported at 99 F. Supp. 180.

instituted proceedings against International Building Company for additional income taxes for the years 1933, 1938 and 1939 on the ground that the company had been using too high a figure as the basis for depreciating a certain building. While the case was pending in the Tax Court, but before trial or other hearing, the United States signed a stipulation stating: "It is hereby stipulated that there is no deficiency in Federal Income Tax due . . ." and the court entered a formal order in those terms. Thereafter the company continued using the same figure, and, in 1948, the United States again challenged its accuracy in a proceeding for additional taxes for the years 1943, 1944 and 1945. The company pleaded res judicata but this Court held the doctrine inapplicable.

The rule applied is that res judicata comes into play only (1) when an action is brought on the same claim, or cause of action, as that asserted in an antecedent action, or (2) when a point at issue has been adjudicated on the merits in an antecedent action.

The Court held that the two claims, or causes of action, asserted by the Government were not the same and that the consent judgment of dismissal could not be given the effect of an adjudication of the merits. The Court said:

> "Certainly the judgments are res judicata of the tax claims for the years 1933, 1938 and 1939, whether or not the basis of the agreements on which they rest reached the merits. But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause; it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits." (345 U. S. at 506).

All of this obviously applies to the instant case, and controls it absolutely.

It is hard to ascertain the position of the court below because the opinion contradicts itself. At the outset, the

court said positively that petitioners must be precluded, if precluded at all, on the ground that the two causes of action involved are the same. The court said there could be no preclusion on the basis of a prior adjudication because "the [first] case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter . . ." (Citing United States v. International Bldg. Co., supra). Therefore, said the court: "The decision of the case is going to depend upon whether the plaintiffs in the present suit are suing upon the 'same cause of action' as that upon which they sued in 1942 and lost." (R. 155) In the ensuing discussion, however, the court failed to answer this question in direct terms. On the contrary it drew a picture of extreme difficulty inherent in the question, cited no Supreme Court or other relevant authority, and concluded the discussion with the statement that: "Since plaintiffs by their consent judgment of 1942 had an adjudication against their claim at that time, we do not think they improve their position by reiterating essentially the same complaint in 1949." (R. 157)

Thus it appears that in the course of writing the opinion the court completely reversed its position.

On the other hand there is language in the opinion to the effect that since petitioners have sued twice on "the same course of wrongful conduct" they are in the position of one who has sued twice on the same claim, or cause of action. (R. 157)

That proposition, we submit, can hardly be taken seriously. It is enough to say that since the present cause of action did not come into being until after the commencement of the first action, the present claim could not have been included in the first action, and therefore the causes of action cannot be the same. Lawlor v. Loewe, 235 U. S. 522, 526; Connecticut Importing Co. v. Frankford Distilleries, 104 F. 2d 79, 81 (C. A. 2). This Court has met this situation in at least three res judicata cases in addition to the *International Case*, and in all of them the Court

assumed that difference of cause of action was so manifest that it would be taken for granted: Cromwell v. Sac County, 94 U. S. 351; United States v. Moser, 266 U. S. 263; Tait v. Western Md. R. Co., 289 U. S. 620.

With respect to the court's statement that "by their consent judgment of 1942 [plaintiffs] had an adjudication against their claim" it would be superfluous to say more than that it is in direct conflict with the express ruling of the *International Case*.

Finally, we submit, the distortion of the law of res judicata in this case is doubly harmful because it serves to promote violation of the antitrust laws. Petitioners complain of a continuing conspiracy. No court has ever found the complaint to be without merit. On the contrary, the only judge who ever looked into the merits found the principal defendant guilty (page 5, supra). Yet the opinion below would forever deny petitioners a hearing even on an application for an injunction to restrain future operation of the conspiracy. In this respect the opinion runs counter to the spirit of this Court's decision in Mercoid Corporation v. Mid Continent Investment Co., 320 U. S. 661, 669-670.

II.

The court did not state the grounds for dismissal of the case with respect to the five respondents who are not alleged to have been in the conspiracy prior to the termination of the 1942 action. Presumably, however, this part of the decision rests solely on the premise that the judgment entered in the 1942 case is equivalent to an adjudication of the merits, because it would be quite absurd to suggest that these separate claims, for different periods of time, against different tortfeasors, could constitute the same cause of action. As previously demonstrated, there has been nothing equivalent to an adjudication of the merits, but even if there had been these particular respondents would not be entitled to benefit by it: Bigelow v. Old Dominion C. Min. & Co., 225 U. S. 111.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below should be reversed.

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